Conditions

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CHAPTER 16
CONDITIONS

Literature:

Y Buffelan-Lanore, 'Condition' in *Répertoire de droit civil* (October 2008, update January 2016); HD Gabriel, 'An American Perspective on the 2010 UNIDROIT Principles of International Commercial Contracts', (2013) 77 *RabelsZ* 158–73; B Fauvarque-Cosson, 'The New Provisions on Conditions in the UNIDROIT Principles 2010', (2011) *Revue de droit uniforme* 537–48; *HKK*/Finkenauer, §§ 158–163; M Fontaine and F de Ly, *Drafting International Contracts: An Analysis of Contract Clauses* (2009); AB Schwarz, 'Bedingung', in C Heinrici, J Magnus, O Mügel, W Simons, H Titze, and M Wolff (eds), *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes*, vol II (1929) 391–426; R Zimmermann, 'Heard melodies are sweet, but those unheard are sweeter ... Condicio tacita, implied condition und die Fortbildung des europäischen Vertragsrechts', (1993) 193 *AcP* 121–73; Zimmermann, *Obligations*, 716–47.

Introduction before Art 16:101

I. Conditions as a means of the parties' autonomy

The main idea. All European jurisdictions start from the principle that obligations and contracts come into force at once, but may be conditional if the parties wish them to be. Accordingly, most civil law countries have provisions that define a condition as a 'future and uncertain event', which either 'suspends' the obligation 'until the event happens', or 'cancels' the obligation, 'according to whether it happens or not' (Art 1168 *Code civil*[1804]).[1] The common law tradition prefers to call these phenomena contingencies 'designating, for example, an event upon the happening of which, a contractual obligation becomes operative'.[2] The possibility of letting the effects of the agreement depend on the occurrence or non-occurrence of a condition has been interpreted in the French tradition as an accessory to or an element of the agreement, and in the German historical school as a limitation of the parties' will.[3] Both conceptual approaches are meant to summarize the law of conditions, but do not alter the position on their legal consequences. The transnational law texts do not refer to these conceptual questions, but rather 1

[1] All translations of the French provisions (in force before the reform in 2016) by G Rouhette and A Rouhette-Berton (available online); similar provisions in § 158 BGB; Art 151 OR; § 696 ABGB.

[2] MP Furmston and E Macdonald, *The Law of Contract* (4th edn, 2010) [3.26]; W Blackstone, *Commentaries on the Laws of England*, vol II (Oxford, 1766) 152 (ch 10) who gives the following definition: 'being such whose existence depends upon the happening or not happening of some uncertain event'.

[3] On both interpretations see Schwarz, 'Bedingung', 393.

attempt to provide standard rules on the law of conditions intended to help parties to draft and apply their contractual conditions (below, [17]).

2 **Function.** Conditions have always been used to adapt legal transactions—be it a will or a contract—to the circumstances of each individual case.[4] They are an important extension of the parties' autonomy,[5] because an agreement on condition allows the parties to deal with the uncertainty of the future and to find the most appropriate arrangement for their mutual obligations. More specifically, conditions open up the possibility of requiring some particular conduct via an indirect obligation: If the party charged with the condition meets the requirement of the condition or avoids the behaviour sanctioned by the condition, the legal transaction will be more favourable to him.[6] This double-sided effect of conditions is most obvious in Roman law, where a condition was used for the stipulation of contractual penalties on the one hand and for the reservation of a right to withdraw from a sales contract (*Rücktrittsvorbehalte*) on the other.[7] The penalty and the reservation of a right to withdraw were conditional in the sense that they could only be enforced if the condition lapsed.[8] In these cases, fulfilment of the condition could depend on a completely external event (eg, 'if a ship arrives from the shores of Africa'; 'if Titius becomes consul');[9] on a positive action from one party (eg, 'if you go up the Capitoline Hill');[10] or on an omission (eg, 'if you don't give me the object you promised').[11] In the same vein, the parties could provide for the vendor's right of withdrawal from a contract of sale on the condition that a third party offered a better price (eg, 'if there is not a better offer by the third of May')[12] or that the purchaser failed to pay the price (eg, 'if you don't pay the whole amount of the price by the second of June').[13] Similar observations can be made for the English common law, eg with regard to conditional bonds.[14]

3 **Legal institutions not covered.** The parties' use of conditions must be distinguished from the application of conditions as a means of interpretation, allowing the courts to apply or develop remedies. Such 'implied conditions' are known in the civil and the common law tradition,[15] eg *clausula rebus sic stantibus*,[16] frustration of contract,[17] and the conditional *synallagma*

[4] R Zimmermann, 'Heard melodies', 125; *HKK*/Finkenauer, §§ 158–163, [1]; *Münchener Kommentar*/Westermann, § 158, [1].

[5] Schwarz, 'Bedingung', 392. The best summary in R von Jhering, *Geist des römischen Rechts*, vol I (1885) § 53, 157: 'Die Dispositionen für die Zukunft hängen in ihrer Zweckmäßigkeit und Nothwendigkeit oft noch von zukünftigen Verhältnissen ab; dürfte man sie nur schlechthin treffen, so müßte man in manchen Fällen sich ihrer zunächst gänzlich enthalten'.

[6] For conditions in the Roman law of stipulations see Zimmermann, *Obligations*, 716–47; *HKK*/Finkenauer, §§ 158–163, [5].

[7] On the reservation of a right to withdraw from a sales contract see F Peters, *Die Rücktrittsvorbehalte des römischen Kaufrechts* (1973); important differences in U Wesel, 'Zur dinglichen Wirkung der Rücktrittsvorbehalte des römischen Kaufs', (1968) 85 *ZSS (RA)* 94–172. In English see AC Thomas, 'Provisions for calling off a sale', (1967) 35 *Tijdschrift voor Rechtsgeschiedenis* 557–72 and Zimmermann, *Obligations*, 735–41. The latest comprehensive work is E Nicosia, *In diem addictio e lex commissoria*, (2013).

[8] On penal stipulations in Roman law see R Knütel, *Stipulatio poenae: Studien zur römischen Vertragsstrafe* (1976).

[9] See eg Gai D 45.1.141.7 and Iul D 45.1.57.

[10] See Mod D 45.1.103.

[11] See Pap D 45.1.115.2.

[12] The so-called *in diem addictio*, see eg Paul D 18.2.1.

[13] The so-called *lex commissoria*, see eg Pomp D 18.3.2.

[14] Zimmermann, 'Heard melodies', 127.

[15] Zimmermann, 'Heard melodies', 134–46; for the civil law tradition see also Fauvarque-Cosson, 'New Provisions', 541.

[16] Zimmermann, 'Heard melodies', 134–6.

[17] Zimmermann, 'Heard melodies', 137–42; however, the 'implied terms' theory of frustration was disapproved in English law by Lord Reid in *Davis Contractors v Fareham Urban District Council* [1956] AC 696.

(Art 1184 *Code civil*[1804]).[18] These judicial inventions are nowadays regarded as independent legal institutions with rules of their own. Consequently, the provisions on conditions in European private law only apply to the conditions which the parties have agreed upon. The parties' agreement, however, may also cover conditions agreed to tacitly and eventually revealed by the courts' interpretation (implied conditions, *condicio tacita*).[19] These tacit conditions are contractual conditions and must therefore be distinguished from legal conditions (*condicio iuris*) that are simply the requirements of law for a particular transaction and therefore not covered by the rules on conditions.[20] In Roman law as in common law, the separation between the two terms is not without difficulty,[21] but modern civil law doctrine strictly separates both phenomena; it is for the courts to decide whether the tacit condition is one created by the parties or one belonging to the sphere of the law.[22]

Terminology. The modern term 'condition' (*condition, condizione, condición*) is derived from the latin noun *condicio* which describes the result of a mutual determination (*condicere*='to determine mutually, to agree').[23] Broadly speaking, the term comprises a variety of applications within national legal systems, which creates ambiguity regarding the international and European understanding of the term. In the widest sense, 'condition' simply denotes a contractual clause (terms or 'conditions of a contract',[24] *Vertragsbedingungen*).[25] In a relatively general sense, it may also refer to conditions imposed by the legislator, meaning, eg, requirements for the validity of the contract (condition precedent, pre-condition or *Rechtsbedingung*).[26] Provisions on conditions are not meant to apply to both phenomena. However, parties are in principle free to incorporate a legal requirement into their contract and to confer (a) conditional value on its fulfilment. 4

Conceptual distinctions. Due to their special function, conditions are to be distinguished from similar contractual mechanisms. The most important distinction within the civil law tradition is the distinction between a condition and a term. Whereas a 'condition' depends on an uncertain event,[27] the wording of a 'term' refers to a date, ie to a certain event on a determined or undetermined date.[28] This distinction derives from Roman law, which already distinguished between a term (*dies*), a condition (*condicio*), and a burden (*modus*). A term depending on an event that was certain, but the date of which was uncertain, such as the death of a person, was classified as an uncertain term, which meant that its legal consequences were mainly those of a 5

[18] On the history see *HKK*/Finkenauer, §§ 158–163, [11]; C Hattenhauer, *Einseitige private Rechtsgestaltung* (2011) 103–10; on the conditional synallagma in French law, that is today explained by the idea of cause see Buffelan-Lanore, 'Condition', [3].

[19] On tacit conditions Zimmermann, 'Heard melodies', 126; Zimmermann, *Obligations*, 719.

[20] *HKK*/Finkenauer, §§ 158–163, [3].

[21] For Roman law see GG Archi, 'Condizione nel negozio giuridico', in id, *Scritti di diritto romano*, vol I (1981) 243–79, 252 f; for English law see Furmston and Macdonald (fn 2) [3.19]–[3.25].

[22] *HKK*/Finkenauer, §§ 158–163, [3].

[23] *Thesaurus linguae latinae*, Art *condicio* IV, column 127, line 70–7. Different etymologies in Leibniz, 'Einleitung' (as in M Armgardt, *Das rechtslogische System der 'Doctrina conditionum' von Gottfried Wilhelm Leibniz* (2001) 13 f), who considers also the etymology from *condendus* = something that has to be put together ('etwas Zusammenzutuendes').

[24] On the variety of meanings see Furmston and Macdonald (fn 2) [3.26].

[25] *Münchener Kommentar*/Westermann, § 158, [1].

[26] There are regularly scholars claiming that legal conditions should be treated in the same way as contractual conditions, see for the latest M Latina, *Essai sur la condition en droit des contrats* (2009) [692]; the traditional view in R Bork, in *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, vol 1 (2015) Vorbemerkungen §§ 158–163 BGB, [22]–[26].

[27] Very clear indeed § 704 ABGB, on which see C Spruzina, in *ABGB-Online-Kommentar* (2013) § 704 ABGB, [3].

[28] See eg Art 1185 *Code civil*, § 163 BGB, § 704 ABGB. A general overview in Schwarz, 'Bedingung', 394 f, for French law see Buffelan-Lanore, 'Condition', [20]–[22].

condition.[29] In modern law, the distinction is often largely theoretical, as most codifications apply the rules on conditions equally to terms.[30] The most important difference might be that late performance is automatically a breach of a term, whereas conditions may solely require the best efforts of the parties.[31] In the common law tradition, conditions are to be distinguished from warranties and innominate terms. Whereas the breach of a condition gives the other party the right to treat the contract as repudiated, breach of a warranty allows the other party to claim for damages,[32] and the legal consequences of innominate terms are to be determined according to the factual consequences.[33] In all jurisdictions, the identification of a contractual term as a condition is a legal question to be solved by the court with a view to the parties' agreement.[34]

II. Characteristics and distinctions of conditions

6 **Resolutive and suspensive conditions.** In determining the effects of conditions, the civil law distinguishes 'resolutive' from 'suspensive' conditions, whereas the common law separates 'conditions precedent' from 'conditions subsequent'. A condition is suspensive where the contract or the obligation will only come into force if the uncertain event occurs or—if the parties so provide—does not occur.[35] Under a resolutive condition, a valid obligation or contract is terminated if the uncertain event arrives or—depending on the parties' framing of the condition—does not arrive.[36] Similarly, in English law, a condition precedent is said to be 'an operative fact that must exist prior to the existence of some legal relation', whereas a condition subsequent covers 'an operative fact that causes the termination of some previous legal relation'.[37] The distinction between these two types of condition is of utmost importance in both traditions, since, in the case of a suspensive condition or condition precedent, there is no obligation until the condition is fulfilled, whereas a resolutive condition or condition subsequent will lead to the subsequent termination of an existing obligation. The choice of the type of condition falls within the parties' autonomy: it is up to them to determine if they want to be bound first and released later upon occurrence of the uncertain event, or if they prefer to await the occurrence of the uncertain event in order to be bound if it takes place. However, since the categorization of a contractual term as a condition is within the courts' competence (above, [5]), not all clauses described as 'conditions precedent' in contractual practice should be regarded as suspensive conditions. Often these contractual terms contain a mix of 'conditions and other specific matters which still need to be agreed upon or real obligations the parties must fulfil in the course of the negotiations'.[38]

[29] The problem is discussed for bequests, see U Babusiaux, *Römisches Erbrecht* (2015) 243 f; the modern terminology is just inversed see *Staudinger*/Bork, Vorbemerkungen §§ 158–163 BGB, [9].

[30] *HKK*/Finkenauer, §§ 158–163, [2]; on the French tradition see Fauvarque-Cosson, 'New Provisions', 541–2.

[31] Peel, *Treitel* [18-054].

[32] See Peel, *Treitel* [18-042]; Furmston and Macdonald (fn 2) [3.34]–[3.35].

[33] Further details in Furmston and Macdonald (fn 2) [3.39]. The contract may be rescinded if the breach of the innominate term 'substantially deprives the innocent party of the whole of the benefit, he, or she, was intended to derive from the contract'.

[34] Buffelan-Lanore, 'Condition', [22]; Latina (fn 26) [211]–[213]; Furmston and Macdonald (fn 2) [3.35].

[35] Commonly accepted see eg Art 1181 *Code civil*1804, on which see Buffelan-Lanore, 'Condition', [17]; § 158 I BGB; Art 151 OR; § 696 ABGB.

[36] Commonly accepted see eg Art 1183 *Code civil*1804, on which see Buffelan-Lanore, [18]; § 158 (2) BGB; Art 154 OR; § 696 ABGB.

[37] AL Corbin, 'Conditions in the Law of Contracts', (1919) 28 *Yale LJ* 739–68, 747; for English law see Furmston and Macdonald (fn 2) [3.27].

[38] Fauvarque-Cosson, 'New Provisions', 540.

Further types of conditions in national legal systems I: Types of potestative conditions. In different European countries, further types of conditions are distinguished either in the law texts or in academic doctrine. The richest tradition that stems directly from the Roman law texts can be observed in the French *Code civil* (Art 1168–1184 *Code civil*1804).[39] Besides the well-known and aforementioned distinction between resolutive and suspensive conditions, French law explicitly differentiates the 'casual condition' (Art 1169 *Code civil*1804) from the 'potestative condition' (Art 1170 *Code civil*1804) and the 'mixed condition' (Art 1171 *Code civil*1804). This distinction relates to the nature of the event that is being contemplated. A casual condition is 'one which depends upon chance and which is in no way in the power of the creditor or of the debtor', while a potestative condition is 'one which makes the fulfilment of the agreement depend upon an event which one or the other of the contracting party has the power to make happen or to prevent'. Lastly, a mixed condition 'depends at the same time upon the wish of one of the contracting parties and upon the wish of a third party'. Casual conditions can relate to natural events or actions of third parties;[40] they do not cause further problems. Although the details of the law on potestative and mixed conditions are disputed and complicated, there is a common understanding that a potestative condition, which challenges the binding force of the contract as such, is not valid. French doctrine distinguishes between a potestative condition that is simply potestative (*simplement potestative*) and one that is purely potestative (*purement potestative*) or discretionary. The fulfilment of a simply potestative condition is subject to the will of one party in conjunction with an external event that is outside that party's control, whereas a purely potestative condition depends solely on one party's will.[41] If this party is the one obliged by the conditional obligation, the agreement constitutes a contradiction in terms and is therefore void (Art 1174 *Code civil*1804).[42] The same will be true in English law with regard to illusory consideration or in American law under the heading of illusory contracts.[43] 7

Further types of conditions in national legal systems II: positive and negative conditions. It is up to the parties to determine the terms of the condition. This includes the freedom to formulate the condition in positive or negative language, ie to let the legal effects depend on the occurrence or non-occurrence of the event.[44] A negative condition may, however, cause practical problems already known in Roman law. This is especially true for a negative potestative condition, ie a condition that imposes a non-act on a party, eg 'if you do not climb up the Capitoline Hill'.[45] As it remained uncertain whether the party would climb the Capitoline Hill during his lifetime, the condition could not be treated as fulfilled until he was dead.[46] In order to overcome this conceptual difficulty, the Roman jurists expedited the process by allowing a fictional coming into force of the conditional transaction: they asked the party who would benefit from the condition to promise that he would refrain from engaging in the activity prohibited by the 8

[39] The new French law is concentrated on the difference between suspensive and resolutive condition (Art 1304 *Code civil*); the potestative condition is dealt with in Art 1304-2 *Code civil*). It is plausible that the differences developed in accordance with the old law will persist within the French doctrine.

[40] Buffelan-Lanore, 'Condition', [10].

[41] Buffelan-Lanore, 'Condition', [12].

[42] Art 1174 *Code civil*1804 'Toute obligation est nulle lorsqu'elle a été contractée sous une condition potestative de la part de celui qui s'oblige', on which see Buffelan-Lanore, 'Condition', [24] f.

[43] For English law see R Duxbury, *Contract Law: Sweet & Maxwell's Textbook Series* (2008) [4-015]; for American law see Gabriel, 'An American Perspective', 163.

[44] See DCFR III.-1:106, Comment B.

[45] Eg Pap D 45.1.115.1.

[46] Another solution was the addition of a term, during which the party had to refrain from doing the relevant activity, see Pomp D 45.1.27.1; see also Celsus D 45.1.99.1.

condition (the so-called *cautio Muciana*).[47] The (formal) promise not to climb up the Capitoline Hill was therefore constructed as a guarantee: if the promisor kept to the stipulation, the transaction would benefit him; if the promisor failed to keep the promise, he was liable to pay compensation to the amount of the benefit obtained by the transaction.

III. Consequences and limitations of conditional contracting

9 **The pending of a condition.** No matter the kind of condition the parties have chosen to apply, the nature of all conditions implies a period during which it is unclear whether the obligation will come into force (suspensive condition) or will be terminated (resolutive condition). Most national laws on conditions can be explained by the need to protect the parties during this time of uncertainty. The Roman jurists who contemplated this situation of *condicio pendet*[48] differentiated the legal consequences based on the function and the context of the condition,[49] and made efforts to help a party when the other had prevented the condition from materializing (below, [15]). Moreover, the Roman jurists acknowledged some prior effect of conditions. Notably, although an obligation under a suspensive condition could not be enforced,[50] the transaction could be passed on to the beneficiary's heirs if the beneficiary died before the fulfilment of the condition.[51] Moreover, the pending obligation could also be novated, abrogated and assured via pledge.[52] The most important theoretical efforts to analyse and penetrate the very nature of this period of abeyance were made during the Enlightenment. In his *doctrina conditionum*, Gottfried Wilhelm Leibniz (1646–1716) applied logic to the problem and held that a conditional agreement was valid from the very beginning, and only inflicted with uncertainty concerning the fulfilment of the condition.[53] In modern legal doctrine, Werner Flume has used the Roman sources to develop a ground-breaking analysis of differences between legal reasoning that considers the 'legal act' (*Rechtsakt*) and that referring to the 'legal relationship' (*Rechtsverhältnis*).[54] According to his view, Roman jurisprudence saw the legal act, ie the agreement or contract itself, as 'conditional', whereas modern juridical doctrine treats the effects or legal consequences, ie the 'legal relationship', as conditional. Flume's interpretation helps to explain the limited but tangible effects of a pending condition in Roman law:[55] the contract is

[47] On the name see Zimmermann, *Obligations*, 723. For the context within the law of succession see Babusiaux (fn 29) 247 f.

[48] Zimmermann, *Obligations*, 724 f, who refers to 'non est pro eo, quasi sit' and to 'spes debitum iri'. It has recently been argued that the question was not treated as a legal one, see M Winkler, *Mathematik und Logik in Julians Digesten* (2015) 162–222. For a thorough overview of the implications of the suspension see H Peter, *Das bedingte Geschäft: Seine Pendenz im römischen und im schweizerischen Privatrecht* (1994) 3–191.

[49] Such as 'hope', see *HKK*/Finkenauer, §§ 158–163, [8]; a good overview of different situations (with all sources) in S Meier, 'Schadenersatz aus Verfügungsgeschäften: Zum Hintergrund des § 160 BGB', (2012) 76 *RabelsZ* 732–60, 738–40.

[50] *HKK*/Finkenauer, §§ 158–163, [7]; on *pluris petitio* see U Babusiaux, *Id quod actum est* (2006) 44–58.

[51] *HKK*/Finkenauer, §§ 158–163, [7].

[52] Gai D 20.4.11.1: '... cum enim semel condicio exstitit, perinde habetur, ac si illo tempore, quo stipulatio interposita est, sine condicione facta esset ...' on which see Zimmerman, *Obligations*, 727; *HKK*/Finkenauer, §§ 158–163, [7].

[53] GW Leibniz, *Specimen certitudinis seu demonstrationum in jure exhibitum in Doctrina Conditionum* (Altdorfi, 1669), on which see Armgardt (fn 23).

[54] W Flume, 'Der bedingte Rechtsakt nach den Vorstellungen der römischen Klassiker', (1975) 92 *ZSS (RA)* 69–129; W Flume, *Rechtsakt und Rechtsverhältnis: Römische Jurisprudenz und modernrechtliches Denken* (1990) 120–70.

[55] The Roman sources do not treat a resolutive condition as a 'condition', but as an additional agreement (*pactum*) that is itself under a suspensive condition. This state of the sources is an important argument to support Flume's view. See also G Jahr, 'Auflösende Bedingungen und Befristungen im klassischen römischen Recht', in *Festschrift für Hubert Niederländer* (1992) 27–40.

not yet valid, but if all acts necessary for a formal contract have been carried out, the agreement may nevertheless have certain effects.

Contractual obligation or contract. The wording of the different texts is not uniform as regards the point of reference of the condition. On the one hand, the PICC apply the rules on conditions to contractual obligations and contracts; on the other hand, the PECL and the DCFR presuppose the existence of a contract.[56] It seems that the difference in wordings stems from different legal traditions. The approach of the PICC is inspired by the English law, which sometimes distinguishes a condition that is a 'prerequisite of the very existence of an agreement'[57] from a condition precedent, which refers to the performance of an obligation.[58] In contrast, both the civil law tradition and American law[59] define conditions as accessories to or restrictions of an existing contract. Contrary to some authors' views,[60] there is no reason to distinguish the binding force of a contract on a suspensive condition under the rule of the PECL or DCFR from the rule of the PICC. In fact, all European and international texts agree that the parties are under a duty to respect each other's interests and to act according to good faith and fair dealing for all kinds of conditions.[61] The traditional distinction between conditions precedent to performance and conditions precedent to contracts is therefore not relevant for the parties' reciprocal duties,[62] but may only be used to determine the exact effect of its fulfilment or its failure. Moreover, PECL 1:107 explicitly states that the rules on conditions may also apply to 'unilateral promises and to other statements and conduct indicating intention' (with any appropriate modifications).[63] This may include an offer or acceptance on condition, meaning that the contract itself will be conditional, as long as the other party agreed on its conditional nature. Therefore, despite the different wording, no essential differences can be observed between the PECL and the PICC. The condition may affect one or several obligations of the parties, or even the contract itself.[64] 10

Transactions adverse to conditions (*Bedingungsfeindlichkeit*). Since the 19th century, German law, based on Roman sources, has developed the rule that not all transactions can be subject to a condition.[65] This idea was linked to the identification of a new type of legal right, the capacity to alter a legal relationship (*Gestaltungsrecht*) unilaterally.[66] Unfortunately, the identification of this new type of a legal right has become an impediment to the exercise of unilateral rights in general. This is why there have recently been attempts to re-define the scope of the prohibition.[67] The new rule can be summarized as follows. It is agreed that, due to public interest considerations, 11

[56] PECL 16:101, Comment A; on the difference to PICC see Fauvarque-Cosson, 'New Provisions', 539.

[57] Lord Denning MR in *Wickman Machine Tool Sales Ltd v Schuler AG* [1972] 2 All ER 1173, [1972] 1 WLR 840.

[58] On the common law see MP Furmston and E Macdonald, *The Law of Contract* (4th edn, 2010) [3.27]–[3.30].

[59] Gabriel, 'An American Perspective', 162.

[60] *Vogenauer*/Rowan, Art 5.3.1, [5].

[61] Conversely *Vogenauer*/Rowan, Art 5.3.1, [5], who claims that PICC 5.3.3 should be explained via the possibility of making a contract conditional.

[62] Especially under common law, a condition precedent to performance may include subsidiary obligations, whereas in principle a condition precedent to a contract does not imply such duties, see Furmston and Macdonald (fn 58) [3.31].

[63] PECL 16:101, Comment A; the Commentary on PECL 1:107 does not deal with conditions.

[64] PECL 16:101, Comment B.

[65] The Roman sources are the *actus legitimi*, Pap D 50.17.77: '... qui non recipiunt diem vel condicionem', on which see Flume, Rechtsakt, (fn 54) 122 f.

[66] On the invention see Hattenhauer (fn 18) 283–304; on the very peculiar situation of German law see Schwarz, 'Bedingung', 406.

[67] Hattenhauer (fn 18) 303 f.

rights relating to status, family law matters, and the formation of a company may not be conditional.[68] A general prohibition on conditions in the context of unilateral legal acts is however too extensive, especially in a contractual setting, and must be abandoned. The general rules of illegal and unfair contracts should be the criteria for deciding whether a condition is contrary to the nature of an obligation.[69] Unless the integration of a condition infringes upon fundamental principles or mandatory rules (PECL 15:101 and PECL 15:102)[70] or leads to an excessive benefit or unfair advantage in favour of one party (PECL 4:109),[71] there is no need to restrict the parties' freedom to agree on conditions.

12 **Impossible conditions.** In national legal systems, conditions that relate to impossible events are null and may render void the entire agreement or obligation that was constructed to depend upon the condition.[72] In practice, exceptions to this all-or-nothing rule have been developed, especially for resolutive conditions, which can be considered void without affecting the validity of the contract.[73] The 'impossibility' of a condition means its factual and initial unfeasibility. Hence, conditions are considered to be impossible if they refer to events that can never happen. The clearest example is given in Roman law, where a verbal contract on the condition 'if you touch the sky with your finger' was considered to be void.[74] More commonly, the impossibility of a condition may derive from the fact that it refers to an event that was itself feasible but that did not come into existence due to the circumstances of the case.[75] In European private law, the problem of an impossible condition must be dealt with differently,[76] since all texts (PECL 4:102; DCFR II.-7:102; PICC 3.1.3) explicitly hold that 'a contract is not invalid merely because at the time it was concluded performance of the obligation assumed was impossible'. This means that contracts with impossible conditions cannot be regarded as void, but must be considered as valid in principle, though subject to avoidance by the debtor (below, Art 16:101, [9]). Finally, some national legal systems explicitly state that 'a condition not to do an impossible thing does not render void the obligation contracted upon that condition' (Art 1173 *Code civil*[1804]). This rule is self-evident, since it bans attempts to use the rules on impossible conditions to avoid the binding force of the contract.

13 **Immoral and illegal conditions.** In national legal systems, immoral and illegal conditions are treated as invalid.[77] Immoral and illegal conditions are those which pursue an illegal purpose or

[68] Hattenhauer (fn 18) 304; an overview in *Münchener Kommentar*/Westermann, § 158, [26] f; for French law see Buffelan-Lanore, 'Condition', [7].

[69] See UG Schroeter, 'Bedingte Parteierklärungen und Vertragsbindungen unter dem UN-Kaufrecht (CISG)', in *Festschrift für Ulrich Magnus* (2014) 301–18, 312: 'Erklärungsbestimmtheit'.

[70] Fundamental principles mean essential guarantees that are accepted in European Union law, see PECL 15:101, Comment B; the mandatory rules are to be taken from the applicable national laws, see PECL 15:102, Comment B.

[71] Relief will be available if the disadvantaged party can explain acceptance of the excessive benefit for the other by weakness, disability, or need from the party's side, see PECL 4:109, Comment B.

[72] For England see Blackstone (fn 1) 155 f; for France see Art 1172 *Code civil*[1804], on which see Buffelan-Lanore, 'Condition', [27]–[30]; for German law see *Münchener Kommentar*/Westermann, § 158, [48].

[73] For an overview see *Münchener Kommentar*/Westermann, § 158, [46]; C Reymann in *Beck-Online Großkommentar* (2016) § 158 BGB, [98].

[74] Gai, *Institutiones* 3.98, on which see HLW Nelson and U Manthe, *Gai institutiones III 88–181. Die Kontraktsobligationen: Text und Kommentar* (1999) 126 f.

[75] An example for this type may be taken from the *Cour d'appel de Paris*, which decided that a condition for a personal surety in the registration of a mortgage was void if the debtor had never acquired land (to be mortgaged), see *Cour d'appel Paris* (1997) *JurisData* No 021438 (06.06.1997), on which see Buffelan-Lanore, 'Condition', [52].

[76] Clearly *Vogenauer*/Huber, PICC 3.1.3, [3]; PICC 3.1.3 deviates from the Romanistic tradition.

[77] For French law see Buffelan-Lanore, 'Condition', [69]–[74]; see also Art 1304-1 *Code civil*; for German law see *Münchener Kommentar*/Westermann § 158, [45] f; *Staudinger*/Bork, Vorbemerkungen §§ 158–163 BGB; for Austria see § 698 ABGB, on which see *ABGB-Online-Kommentar*/Spruzina, § 698 ABGB, [4].

are intended to provoke immoral or illegal conduct by a contracting party or a third party. In contractual matters, the most important applications of this rule are the infringement of (unwritten) rules of public order or for the protection of individual freedom.[78] As the transnational texts contain rules on immoral and illegal contracts, these rules can also be applied to conditions which lead to similar results to those achieved in national laws (PECL 15:101; PECL 15:102; DCFR II.-7:301; DCFR II.-7:302; PICC 3.3.1, see below, Art 16:101, [10]). The standards for fundamental principles and for mandatory rules, however, are not set within these texts, but derive from European Union law and from the national laws applicable to the case in question.[79]

Effects of condition, especially retroactivity. For a long time, one of the most disputed issues in the law of conditions has been the retroactive effect of the fulfilment of the condition. Indeed, for both suspensive and resolutive conditions, it has been questioned whether the coming into force of the agreement or the contract would have to be taken as retroactive, meaning that the agreement or the contract would have to be treated as if it had been completely valid from the very beginning. The Roman law texts at times seem to accept such retroactive effect, but there was no consensus among the Roman jurists.[80] It was Bartolus de Saxoferrato (1313–57) who shaped the idea that conditions (both suspensive and resolutive) must have retroactive effect: *conditio in contractibus trahitur retro*.[81] From the Middle Ages until the development of the humanists' jurisprudence, this doctrine was predominant and influenced the Natural law codifications, especially the French *Code civil*.[82] Despite the intensity of the discussion up to the 19th century, the practical consequences of the dispute are quite limited, notably because all supporters of retroactive effect accepted a number of exceptions.[83] In modern law, retroactive effect has almost completely disappeared, although in most European national legal systems the parties are free to agree on such a fictional effect. The most important step in overcoming the medieval doctrine was taken by Bernhard Windscheid,[84] who argued that the Roman sources considered the parties to be bound by the conditional transaction itself,[85] not by the coming into effect of the condition. This view was adopted by the BGB, drafted during Windscheid's lifetime,[86] and seems to prevail in modern legislation,[87] although the new French civil code preserves retroactive effect as a rule for resolutive conditions.[88] 14

Conditions prevented from materializing. One of the achievements of the law of conditions developed by the Roman jurists was the fictional coming into force of the condition when one party prevented the condition from materializing. This rule stems from the law of testamentary 15

[78] For French law see Buffelan-Lanore, 'Condition', [63]–[64].

[79] See PECL 15:101, Comment B; PECL 15:102, Comment B; DCFR II.-7:301, Comment B; DCFR II.-7:302, Comment B; *Vogenauer*/Cuniberti, PICC 3.3.1, [1].

[80] Zimmermann, *Obligations*, 726 f.

[81] On Bartolus' doctrine see G Schiemann, *Pendenz und Rückwirkung der Bedingung: Eine dogmengeschichtliche Untersuchung* (1973) 29–35 with further references.

[82] On the *mos italicus* see Schiemann (fn 81) 36–49; on the French scholars of the 16th century see id (fn 81) 49–63. A nuanced approach is taken by the ABGB, see Schiemann (fn 81) 77–9; Art 1179 *Code civil*1804 states: 'A condition which is fulfilled has a retroactive effect to the day when the undertaking was contracted. Where the creditor dies before the condition is fulfilled, his rights pass to his heir'.

[83] Fauvarque-Cosson, 'New Provisions', 543 f; Meier (fn 49) 740 f.

[84] B Windscheid, *Die Wirkung der erfüllten Bedingung* (1851); on predecessors and context see *HKK*/Finkenauer, §§ 158–163, [9].

[85] Windscheid (fn 84) 3 f, on which see *HKK*/Finkenauer, §§ 158–163, [9].

[86] § 159 BGB, on which see *Münchener Kommentar*/Westermann, § 159, [1]–[5].

[87] See Art 3:38 (2) BW.

[88] See Art 1304-6 *Code civil* in contrast to Art 1304-7 *Code civil*.

manumission of slaves[89] and from the law of bequests,[90] and was generalized to a principle of civil law during the Roman Empire: 'It is accepted at civil law that whenever the fulfilment of a condition is prevented by one who has an interest in its non-fulfilment, the condition is to be treated as though it had been satisfied'.[91] The rule expressed as such in the Roman law texts was adopted by medieval Canon law[92] and then found its way into most continental codifications.[93] A new element in its reception has been to link the fictional fulfilment (or non-fulfilment) to the general principle of good faith. Nowadays, the rule can be spelled out as follows. If a party, to whose detriment the condition would have been fulfilled, prevented the fulfilment of the condition contrary to good faith, the condition is deemed to have materialized. If, however, a party to whose advantage the fulfilment of the condition would have operated, brought about the fulfilment of the condition contrary to good faith, the condition is deemed to be unfulfilled. Similar to its civilian counterparts, the courts in common law jurisdictions have developed the idea that wrongful prevention of the fulfilment of a condition is a breach of implied contractual terms.[94] In contrast to the civilian tradition, the innocent party cannot rely on the fictional fulfilment of the condition, but has the right to withdraw from the contract and/or to claim damages.[95]

IV. Provisions on conditions in transnational law

16 **Default rules.** Although conditions have received a thorough legislative and doctrinal treatment in national laws, it must be stressed that their outline and effect mainly depends upon the parties' autonomy.[96] Therefore, most provisions on the content, nature, and effect of conditions are default rules in national legal systems (*dispositives Recht*), meaning that they apply if the parties did not foresee anything more specific or different.[97] One limit to the parties' autonomy can however be seen in the principle of good faith. Since inherent good faith cannot be set aside by the parties and is a criterion of public order, the parties may not—despite all freedom to determine the content, nature, and outcome of the condition—suspend the protection of the party who awaits the coming into force of the condition.

17 **Policy considerations.** The need to regulate conditions has been questioned. Indeed, one could argue that firstly, the framing of the condition is up to the parties and that its legal effect must therefore be determined via interpretation.[98] Secondly, it could be said that most rules on the nature and functioning of conditions have little dogmatic value since they do not allow to decide difficult cases and rather give standards for interpretation that are more of heuristic

[89] The law of the XII-Tables is said to have contained a special provision for conditional manumission, see *Ulpiani Epitome* II.4, on which see E Kalchthaler, *Die historische Entwicklung des Satzes: 'Die vom Gegner vereitelte Bedingung gilt als eingetreten' aus einer Interpretation zur Fiktion* (1959) 20–5.

[90] On this aspect see HJ Wieling, 'Falsa demonstratio, condicio pro non scripta, condicio pro impleta im römischen Testamentsrecht', (1970) 87 *ZSS (RA)* 197–245, 230–42.

[91] Iul D 35.1.24; in the same vein Ulp D 50.17.161; on both see D Daube, 'Condition prevented from materializing', (1958) 28 *Tijdschrift voor Rechtsgeschiedenis* 271–96, 275 f.

[92] See R Weigend, *Die bedingte Eheschließung im kanonischen Recht*, vol I (1963) 88–398.

[93] See Art 1178 *Code civil*[1804], Art 156 OR, § 162 BGB, Art 1359 *Codice civile*; an account by Finkenauer in *MaxEuP*/Finkenauer, 'Condition and Time Term', 350.

[94] Peel, *Treitel* [18-045]; Furmston and Macdonald (fn 2) [3.20].

[95] M Chen-Wishart, 'Formation of Contract', in H Beale (ed), *Chitty on Contracts*, vol I (32nd edn, 2015) 2–159; see also UNIDROIT (2007) Study L—Doc 103 (available online) II.B.A.2.

[96] *HKK*/Finkenauer, §§ 158–163, [1].

[97] Fauvarque-Cosson, 'New Provisions', 538.

[98] Fauvarque-Cosson, 'New Provisions', 537; *Vogenauer*/Rowan, Intro to Section 5.3 of the PICC, [3].

value.[99] However, against this scepticism, it must be stressed that the rules on conditions, despite their (general) simplicity, are helpful tools for the interpretation of ambiguous terms and therefore for the application of the contract.[100] They, therefore, contribute to legal certainty and help to prevent litigation. This is especially true for the protection of the parties during the time the condition is pending; indeed, the written rules help to define whether the condition has been 'breached' by one party.[101]

Textual layers. No provisions on conditions were provided for in the CISG[102] or in the two first versions of the PICC, while the new versions of the PECL, the DCFR, as well as the Gandolfi-project and PICC[2010] contain rules on conditions. Their absence in the older textual layers of European private law can be explained by the widespread idea that rules on conditions are simply tools for interpretation without autonomous value.[103] The main argument to overcome this view was the fact that, in commercial practice, disputes over the interpretation of conditions are relatively frequent and difficult to resolve without any substantive standards. It was argued that some of these disputes could be avoided by introducing some elementary rules on conditions for commercial contracts.[104] Therefore, rules on conditions have been included in the more recent layers of European private law, especially on the types and effects of conditions, interference with conditions, and restitution upon their fulfilment. **18**

[99] Even stronger were the criticisms addressed to the (former) German Democratic Republic, which had proposed to include a provision in the CISG; it was held that the simple definition of a suspensive and a resolutive condition would not help to deal with the difficult theoretical issues of both conditions, see Schroeter (fn 69) 304.

[100] DCFR III.-1:106, Comment A; UNIDROIT (2007) Study L—Doc 103 (available online) I.A.2; *Vogenauer/* Rowan, Intro to Section 5.3 of the PICC, [3].

[101] Peel, *Treitel* [18-053]; S Vogenauer, 'The UNIDROIT Principles of International Commercial Contracts at twenty: experiences to date, the 2010 edition, and future prospects', (2014) 19 *Uniform LR* 481–518, 499.

[102] Schroeter (fn 69) 303 f on the history of the CISG.

[103] *HKK/*Finkenauer, §§ 158–163, [19]: 'Das liegt daran, dass der sachenrechtliche Teil der Problematik außerhalb ihres sachlichen Anwendungsbereichs liegt, während das Bedingungsrecht im übrigen als bloßes Auslegungsproblem begriffen wird'.

[104] Fauvarque-Cosson, 'New Provisions', 538.

Art 16:101: Types of Condition

A contractual obligation may be made conditional upon the occurrence of an uncertain future event, so that the obligation takes effect only if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition).

DCFR III.-1:106: Conditional rights and obligations

(1) The terms regulating a right, obligation or contractual relationship may provide that it is conditional upon the occurrence of an uncertain future event, so that it takes effect only if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition).

(2)–(5) ...

PICC 5.3.1: Types of condition

A contract or a contractual obligation may be made conditional upon the occurrence of a future uncertain event, so that the contract or the contractual obligation only takes effect if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition).

CESL-ELI 74: Conditional rights and obligations

(1) The contract may provide that a right or obligation is conditional upon the occurrence of an uncertain future event, so that it takes effect only if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition).

(2)–(3) ...

I. Essential traits of conditions in European private law

1 **Introduction.** Rules on conditions have only been included relatively recently in the PECL, the PICC[2010], and in the DCFR, which explains the position of the rules in Chapter 16 of the PECL, although systematically speaking, Chapter 6 ('Contents and Effects') would have been a better place for them.[1] All these texts use the civil law terminology for conditions and speak not of 'conditions precedent' and 'conditions subsequent', but of 'suspensive' and 'resolutive' conditions (above, Intro before Art 16:101, [6]). The term 'condition' as used in the PECL is identical to its use in the continental European tradition, covering 'an event that may or may not happen',[2] ie an event characterized by its uncertainty.[3] In European private law too, a condition is to be distinguished from a term providing for a future date, which is fixed and sure to arrive[4] (above, Intro before Art 16:101, [5]). And, just as in national legal systems, the frontier between terms and conditions can be difficult to determine if the event is certain but of an uncertain date. The PECL try to solve this problem with reference to the parties' intention, stating that 'provisions referring to such events will often be time clauses, but may involve a hidden condition if the obligation is contingent on something else happening or not happening before'.[5]

2 **Uncertainty and future.** It has been widely debated in European private law doctrine whether a condition will also be uncertain if the event the parties are referring to takes place in the pre-

[1] PECL 16:101, Comment A.
[2] PECL 16:101, Comment B.
[3] PECL 16:101, Comment B; see also DCFR III.-1:106, Comment C.
[4] PECL 16:101, Comment E.
[5] PECL 16:101, Comment E; misleading DCFR—Definitions: 'term', that seems to imply 'condition' (The DCFR provides for a list of definitions, which is incorporated through DCFR I.-1:108 (1)).

sent or in the past. The PECL and the DCFR take the view that although 'uncertainty may play a vital role in shaping contractual obligation ..., it is not the past event that forms the basis of the condition but the future publication or availability of information concerning that event'.[6] Therefore, the question of whether an event is uncertain is defined by the subjective viewpoint of the parties. If they do not know about the occurrence or non-occurrence of the event, the event is considered to be uncertain, since the condition is linked to subjective knowledge, not to the objective occurrence of the event itself. The same is true for the PICC.[7]

Difference as to the nature of the condition. There is no explicit distinction in European law texts similar to the French distinction between simply potestative and purely potestative or discretionary conditions (above, Intro before Art 16:101, [7]). European law tries to deal with these questions from the viewpoint of interpretation. Indeed, it will depend on the nature of the event to which the parties refer, to determine whether the fulfilment of the condition also requires due diligence from one party,[8] eg in preparing all necessary documents for delivery in another country. This approach means that those conditions, the fulfilment of which is simply subject to one party's control, and that hence signify a complete lack of contractual commitment, do not fall under PECL 16:101,[9] but lead to the absence of a valid contract between the parties. This difference, which is explicitly stated in the Commentary on PECL 16:101, refers to this distinction between potestative and discretionary conditions. The same rules apply to the PICC, although during their drafting, it was deemed unnecessary to provide for an explicit textual basis to explain this elementary distinction.[10] 3

Requirement of performance not covered. Although frequently attached to the treatment of conditions in national laws (above, Intro before Art 16:101, [3]), the reciprocal expectation that the other party will perform, or the prior fulfilment of a contractual obligation by the other party, is a legal condition of the synallagmatic or reciprocal contract, and does not fall within the scope of PECL 16:101–16:103 and similar provisions. This argument is strengthened by the fact that all transnational texts stipulate the mutual dependence of the parties' performance in special provisions (PECL 7:104; DCFR III.-2:104; PICC 6.1.4).[11] These special texts displace the rules on conditions, even if, historically, the right to withhold performance in these cases has been justified in some national legal systems (eg Art 1184 *Code civil*[1804]) on the basis of a tacit condition.[12] In fact, nowadays it seems to be a legal rule that the parties in a synallagmatic contract need to perform simultaneously unless otherwise agreed upon or otherwise to be deduced from the circumstances.[13] 4

II. Types and effects of conditions in European private law

Legal condition. The rules on conditions in the European and international restatements do not refer to conditions imposed by law, but only to those contained in a contract.[14] In contrast 5

6 PECL 16:101, Comment C; DCFR III.-1:106, Comment D.

7 *Vogenauer*/Rowan, Art 5.3.1, [8]–[9].

8 PECL 16:101, Comment B.

9 PECL 16:101, Comment B: 'Some conditions, however, will be so heavily dependent upon the will of one party as to signify a total lack of contractual commitment by that party and hence the absence of a binding contract'.

10 UNIDROIT (2007) Study L—Doc. 103 (available online), I.A.3.a.

11 PECL 16:101, Comment D.

12 The new French law does not differ in substance; see Art 1219 and Art 1220 *Code civil*.

13 PECL 7:104.

14 *Vogenauer*/Rowan, Art 5.3.1, [4].

to national laws, the difference between legal conditions and transactional conditions may be less important, since in a transnational context, the parties may choose the application of another law as a 'condition' of their contract.[15] They may also explicitly determine that the contract shall only be valid if the requirements of a certain legal order are met. In these cases, some have argued that the relevant legal conditions are real transactional conditions, if the law the parties choose is not by itself applicable to the contract.[16] While the possibility of changing a legal condition into a contractual one has been denied in national laws,[17] in international contracts, the parties' autonomy is said to allow such conversion.[18] However, even in transnational law, it cannot be up to the parties to decide who carries the risk of the fulfilment of a legal condition.[19] An intermediate position should therefore meticulously distinguish the legal and the contractual sides of one and the same condition. This is particularly obvious in cases of authorizations that are to be obtained by one party: while the authorization itself is a legal condition, the compulsory nature of which cannot be disposed of by the parties, the parties are free to determine which of them has to take over the burden of asking for the authorization and delivering all documents, 'using best efforts'.[20]

6 **Suspensive conditions.** The nature of a suspensive condition is defined in accordance with civilian national laws;[21] an obligation under a suspensive condition therefore only takes effect if the event occurs. This is considered to be the equivalent of a condition precedent in the common law (above, Intro before Art 16:101, [6]). As the Commentary to PECL 16:101 stresses, this suspension does not prevent a contracting party from incurring liability for anticipatory non-performance (PECL 9:304).[22] Parties are, in principle, also free to formulate a negative suspensive condition, meaning that the non-occurrence of a future uncertain event will give effect to the contract or to the contractual obligation.[23]

7 **Resolutive conditions.** In contrast to a suspensive condition, a resolutive condition brings the contract or the contractual obligation to an end if the uncertain and/or future event occurs. The civilian term 'resolutive condition' is meant to be equivalent to the common law term 'condition subsequent' (above, Intro before Art 16:101, [6]). Here, too, the parties are free to formulate the condition in a negative way, meaning that the non-occurrence of the event will terminate the contract.[24] Liability cannot be based on the fact that the event in the condition failed to take place, if this failure is due to one party's interference with the condition.[25]

8 **Transactions not subject to conditions.** The question has been raised, mostly by German-speaking authors (above, Intro before Art 16:101, [11]), of whether there are obligations arising from the contractual relationship of the parties that cannot be conditional. In contrast to the

[15] The case is developed by PECL 16:101, Comment F.

[16] Fauvarque-Cosson, 'New Provisions', 539 f; *Vogenauer*/Rowan, Art 5.3.1, [4]: 'However, parties to a contract can incorporate conditions that would in any event be imposed by law. In these circumstances, conditions imposed by law become a term of the contract and fall within the scope of Section 5.3'.

[17] R Knütel, 'Zur sogenannten Erfüllungs- und Nichterfüllungsfiktion bei der Bedingung', (1976) 98 *Juristische Blätter* 613–26, 623.

[18] DCFR III.-1:106, Comment E; Fauvarque-Cosson, 'New Provisions', 539 f; on PICC 5.3.1, Comment 1.

[19] See PICC 6.1.14.

[20] See Fontaine and de Ly, *Drafting International Contracts*, 11 f.

[21] This has been criticized as being a contravention of the neutrality of the PICC: see Gabriel, 'An American Perspective', 161 f.

[22] PECL 16:101, Comment G.

[23] On this negative suspensive condition see *Vogenauer*/Rowan, Art 5.3.1, [2].

[24] *Vogenauer*/Rowan, Art 5.3.1, [3].

[25] *Vogenauer*/Rowan, Art 5.3.2, [13].

German-speaking tradition, no European restatement limits the parties' autonomy in this regard. The rules on impossible and illegal conditions that can be derived from transnational law (below, [9]) must be regarded as sufficient restrictions to guarantee the conformity of the parties' agreement with the general legal order.

III. Questions not covered by the European provisions

Impossible and illegal conditions. The European restatements do not contain special provisions on impossible or unlawful conditions.[26] The treatment of these problems must be derived from the general rules on impossibility and illegality. While the rules on unlawful or immoral contracts in transnational law do not differ from those in national legal systems (above, Intro before Art 16:101, [13]), the rules on initial impossibility substantially deviate from existing national laws (above, Intro before Art 16:101, [12]). The rule on initial impossibility in European private law (PECL 4:102; DCFR II.-7:102; PICC 3.1.3) is that the debtor is held liable for non-performance[27] unless the contract was concluded under a mistake that 'was caused by information given by the other party', or 'the other party knew or ought have known of the mistake' or 'the other party made the same mistake' (PECL 4:103; DCFR II.-7:201; PICC 3.2.2).[28] Only in these cases of fundamental mistake as to facts or law will the debtor be able to avoid the contract.[29] Transferred to conditions, these rules imply that the principle according to which an impossible condition is void and renders the contract void cannot be applied under European private law. Given the transnational rules on impossibility, it will be more appropriate in the case of impossible conditions to ask whether one party (typically the debtor) took on the risk of the impossibility of the condition, or if one or both parties were mistaken about the impossibility of the future and uncertain event. In the absence of mistake, the impossibility of the condition will hinder the fulfilment of the condition, but will not infringe the validity of the contract. In the case of mistake, the debtor burdened by the condition may avoid the contract and ask for restitution provided that the requirements of avoidance for mistake of facts or law are met. 9

Pure potestative conditions. Although most European jurisdictions contain special rules for potestative conditions (above, Intro before Art 16:101, [7]), neither the PICC nor the European restatements explicitly mention this kind of condition.[30] The Comments on the DFCR and the PICC consider that the potestative nature of a condition is to be determined by interpretation and, if too much arbitrariness is agreed upon, the binding character of the contract or the obligation must be questioned.[31] In fact, a condition whose fulfilment would depend on one party's discretion would have to be considered void, rendering the contract void and ineffective.[32] This solution can be explained in European private law with regard to PECL 2:102, which states that the intention of a party is to be determined from his statements or conduct as they were reasonably 10

[26] Fauvarque-Cosson, 'New Provisions', 542 refers to Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), *Uniform Act of Contract Law (preliminary draft)* (2004) Art 10/2, which contains such a provision.

[27] PECL 4:102, Comment K and PECL 4:103, Comment G; the problem is dealt with as taking over the risk, see DCFR II.-7:102, Comment L.

[28] On differences in detail between these provisions see *Vogenauer*/Huber, PICC 3.2.2, [4].

[29] Besides, the innocent party might claim damages, see PECL 4:103, Comment K; DCFR II.-7:201, Comment L.

[30] Fauvarque-Cosson, 'New Provisions', 542, again refers to OHADA *Uniform Act of Contract Law* (fn 26) Art 10/3.

[31] DCFR III.-1:106, Comment C; PICC 5.3.1, Comment 4; see also Fauvarque-Cosson, 'New Provisions', 542; *Vogenauer*/Rowan, Art 5.3.1, [16]–[17].

[32] *Vogenauer*/Rowan, Art 5.3.1, [19]; the model rule is from French law, see Art 1174 *Code civil*[1804]; in the same vein Art 155 OR.

understood by the other party. It can be argued that this intention is missing when one party's obligation solely depends on his own discretion because the obligation is under a purely potestative condition. The same reasoning is inherent in the rules on the unilateral determination of the price by one party (PECL 6:105). These rules are said to also apply to 'any other contractual term' that is to be determined by one party.[33] Accordingly, a 'grossly unreasonable' determination of the contractual obligations by one party is not accepted under European private law.[34] Reasonableness is itself determined by PECL 1:302, meaning 'what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account'. With regard to potestative conditions, these principles lead to a flexible solution: At first, the court will have to determine whether the parties' choice of the condition is reasonable, which may be questioned when it comes to purely potestative conditions; then, if the condition is thought to be unreasonable, the court may decide about the legal consequences. The unreasonable condition may lead to the voidness of the entire contract or—if possible—to partial voidness of the condition or the conditional obligation itself.

11 **Closing.** The official Comment on the PICC deals specifically with closing,[35] ie a formal acknowledgement that all stipulated conditions have been satisfied. The reason is to be found in the discussion between lawyers of different jurisdictions on the comparability of conditions precedent and suspensive conditions. It was argued that 'conditions precedent' may refer to any obligation that the parties must declare as accomplished in a pre-contractual document. The document (waiver) may contain proper conditions on which the rules on conditions apply, but the term 'condition precedent' can also refer to any pre-contractual conduct or prerequisite the parties agreed upon and is therefore not synonymous with 'suspensive condition'.[36] It is up to the court to determine the nature of the 'conditions' named in the closing procedure.

[33] PECL 6:105 reads: 'Where a price or any other contractual term is to be determined by one party and that party's determination is grossly unreasonable, then notwithstanding any provision to the contrary, a reasonable price or other term shall be substituted'.

[34] PECL 6:105, Note 1.

[35] PICC 5.3.1, Comment 5; see also Fontaine and de Ly, *Drafting International Contracts*, 138 f.

[36] PICC 5.3.1, Comment 5.

Art 16:102: Interference with Conditions

(1) If fulfilment of a condition is prevented by a party, contrary to duties of good faith and fair dealing or co-operation, and if fulfilment would have operated to that party's disadvantage, the condition is deemed to be fulfilled.

(2) If fulfilment of a condition is brought about by a party, contrary to duties of good faith and fair dealing or co-operation, and if fulfilment operates to that party's advantage, the condition is deemed not to be fulfilled.

CFR III.-1:106: Conditional rights and ıligations

ı–(3) ...

) When a party, contrary to the duty of ıod faith and fair dealing or the obligation co-operate, interferes with events so as to ing about the fulfilment or non-fulfilment a condition to that party's advantage, the her party may treat the condition as not ving been fulfilled or as having been ful-led as the case may be.

) ...

PICC 5.3.3: Interference with conditions

(1) If fulfilment of a condition is prevented by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the non-fulfilment of the condition.

(2) If fulfilment of a condition is brought about by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the fulfilment of the condition.

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(1) ...

(2) When a party, contrary to the duty of good faith and fair dealing or the obligation to cooperate, interferes with events so as to bring about the fulfilment or non-fulfilment of a condition to that party's advantage, the other party may treat the condition as not having been fulfilled or as having been fulfilled as the case may be.

(3) ...

I. Good faith as basic principle for the rules on interference

Introduction. The rules on interference with conditions are at the core of the law of conditions. They are not restricted to definitions and interpretative assistance, but contain legal rules that the parties can neither avoid nor waive, being based on principles of good faith and fair dealing (PECL 1:201 (2); PICC 1.7 (2)).[1] European private law has tried, in this respect, to find a compromise between the traditional approach of the civil law, ie a fictional fulfilment or non-fulfilment that automatically binds both parties (above, Intro before Art 16:101, [15]), and the more cautious common law rules, which treat most interferences as breaches of implied conditions, and therefore only impose liability for breach of contract (above, Intro before Art 16:101, [15]). This compromise is justified for its more flexible approach, which respects the parties' autonomy, and especially the innocent party's choice for or against the fictional fulfilment or non-fulfilment of the condition because of the other party's interference.[2] 1

[1] On their mandatory character see *Vogenauer*/Vogenauer, PICC 1.7, [41].

[2] Clearly DCFR III.-1:106, Commentary H: 'It should be noted that the result of an improper interference which prevents a condition from being fulfilled is not necessarily that the condition is deemed to be fulfilled for all purposes. That could produce rigid and unacceptable results'.

2 **The good faith criterion.** In European private law,[3] the rule on interference with a condition is regarded as an application of the general principle of good faith and fair dealing (PECL 1:201; PICC 1.7). Another line of argument can be that conduct which interferes with a condition is unreasonable and inconsistent insofar as it is self-contradictory to submit the contract to a condition in the first place and then to interfere with its occurrence or non-occurrence.[4] Therefore the rules on interference with conditions have been considered as applications of the prohibition on inconsistent behaviour (PECL 1:302; PICC 1.8),[5] and as coming close to the common law theory of estoppel.[6] These two explanations (good faith and inconsistent behaviour) are complementary. They also serve to apply the parties' duty not to interfere with the condition as early as the pre-contractual stage, as it may be, especially in the case of a suspensive condition, that the parties are not yet under a contractual obligation.[7] According to European private law, the parties' decision to be bound 'under a condition' is enough to prohibit interference, ie any conduct that hinders the coming into force of the contract, and any inducement of a condition that would otherwise fail.

3 **Interference contrary to good faith and fair dealing.** The reference to good faith and fair dealing is not only the basis upon which the interference with a condition is prohibited, but at the same time limits the prohibition. Indeed, interference with a condition, ie acting in order to aid the occurrence or avoidance of the event, can sometimes be legitimate, eg if it is justified by the fulfilment of a legal duty to maintain safety.[8] It is therefore necessary to determine whether the party's interfering conduct was in bad faith. The relevant facts for this determination are the terms of the contract, the parties' intentions, and the interpretation of the scope of the contract with regard to the condition. The same criteria must apply with regard to the evaluation of the subjective side of the interfering party's conduct. Is it necessary that the party knew or wanted to interfere with the condition or is it sufficient that his conduct had the effect of interference? Does an omission count as interference? The answers of national laws to these questions are not uniform: some national laws highlight the bad faith of the acting party,[9] whereas other jurisdictions ask whether the conduct qualifies as blameworthy (fault).[10] The standard of European private law must be determined in accordance with the wording of the texts that require the interference to be against good faith and fair dealing and in conflict with the duty of co-operation between the parties.[11] In this respect, the criterion of unreasonableness seems to be an appropriate description of the conduct that will trigger the legal consequences of 'interference with a condition'. As explained by the Comment to the PECL 1:302, unreasonableness will be determined according to the 'nature and purpose of the contract', 'the circumstances of

[3] One notable exception is R Knütel, 'Zur sogenannten Erfüllungs- und Nichterfüllungsfiktion bei der Bedingung', (1976) 98 *Juristische Blätter* 613–26, 616 f, who argues on the basis of the absence of the good faith criterion for the question in Roman law. However, the historical argument does not hinder the application of the good faith criterion today and the criterion is useful in order to determine the limits of the fiction.

[4] In the same vein see *Vogenauer*/Rowan, Art 5.3.3, [1].

[5] On the argument of equity (*aequitas*) in Bartolus see G Schiemann, *Pendenz und Rückwirkung der Bedingung: Eine dogmengeschichtliche Untersuchung* (1973) 32 f; for German law see *Münchener Kommentar*/Westermann, § 162, [9]–[11]; for the PECL see PECL 16:102, Comment A; for the PICC see Fauvarque-Cosson, 'New Provisions', 546.

[6] This argument is close to the common law doctrine of estoppel see *Vogenauer*/Rowan, Art 5.3.3, [4].

[7] *Vogenauer*/Rowan, Art 5.3.3, [2].

[8] For an example see *Vogenauer*/Rowan, Art 5.3.3, [7].

[9] Especially German law, see *Münchener Kommentar*/Westermann, § 162, [10]; R Bork, in *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, vol 1 (2015) § 162 BGB, [7].

[10] Especially French law, see Buffelan-Lanore, 'Condition', [90]–[93].

[11] On the problem see *Vogenauer*/Rowan, Art 5.3.3, [8].

the case', and 'the usages and practices of the trade or profession'.[12] If a reasonable third person 'in the shoes of the party in question' would not have acted as the party did, the interference must be regarded as unreasonable as well as against good faith and fair dealing. On the contrary, if a reasonable third person would have had no reason to act differently with regard to the condition, the interference is legitimate and cannot lead to the legal consequences of 'interference with a condition'.

II. Consequences of interference in transnational law

Choice of the injured party. The transnational texts differ as to the effects the interference may have on the fulfilment of the condition. Directly inspired by the civil law tradition, PECL 16:102 states that 'the condition is deemed to be fulfilled' if a party prevented the fulfilment of the condition (and on the contrary, 'is deemed not to be fulfilled' if a party brought about the fulfilment of the condition). With more flexibility, DCFR III.-1:106 provides that the 'other party may treat the condition as not having been fulfilled or as having been fulfilled as the case may be'. An even broader view is taken by PICC 5.3.3, which states that the party that interfered with the condition 'may not rely on the non-fulfilment of the condition' or 'on the fulfilment of the condition'. The formulation of the PICC is thought to imply divergent legal consequences; thus, fictional fulfilment or non-fulfilment is not the remedy available under the PICC, but the injured party may seek to terminate the contract and/or to ask for compensation.[13] To support this view, it has been argued that fictional fulfilment may be an inappropriate consequence depending on the facts of the case; the reason may also be that fictional fulfilment is not known to the common law tradition (above, Intro before Art 16:101, [15]).[14] It seems indeed opportune to give the injured party the choice to terminate the contract or to treat the condition as fulfilled, since it may be intolerable to continue to be bound to a party who has been shown to act against good faith and fair dealing.[15] Some scholars have even argued that PICC 5.3.3 would completely avoid the traditional solution of civil law and only provide for damages or rescission.[16] The wording of PICC 5.3.3, however, does not prescribe such a limitation. Moreover, even if PICC 5.3.3 contained such a decision against the civil law tradition, this does not necessarily imply the same for the European texts. In fact, the cautious formulation of the DCFR III.-1:106 and the clear choice of the PECL 16:102 for the civil law tradition point in the direction that, at least in European private law, fictional fulfilment must be regarded as one typical legal consequence of interference with a condition. However, this fiction is not the only remedy, but is available in addition to or instead of damages or rescission (below, [7]) at the election of the injured party. 4

Limits to fictional fulfilment in European private law. Apart from the general question of applicability, the PECL stress that the fictional fulfilment of the condition 'is subject to the limits of practicality' which stem from limitations on the availability of specific performance 5

[12] PECL 1:302, Comment B.

[13] S Vogenauer, 'The UNIDROIT Principles of International Commercial Contracts at twenty: experiences to date, the 2010 edition, and future prospects', (2014) 19 *Uniform LR* 481–518, 499; *Vogenauer*/Rowan, Art 5.3.3, [13].

[14] Fauvarque-Cosson, 'New Provisions', 546; *Vogenauer*/Rowan, Art 5.3.3, [18].

[15] See DCFR III.-1:106, Comment H; In the cited case the interference of one party is qualified as a 'cynical and serious breach of the duty to act in accordance with good faith and fair dealing'. The innocent party may therefore prefer to terminate the contractual relationship (and not be bound to a party who is acting against good faith and fair dealing); see also *Vogenauer*/Rowan, Art 5.3.3, [17].

[16] Vogenauer (fn 13) 499; *Vogenauer*/Rowan, Art 5.3.3, [19].

(PECL 9:102 (2)).[17] The example given in the PECL is one of an export licence that the seller has failed to apply for in due time; as an export without such licence would be unlawful or impossible, the export licence cannot be deemed to exist (PECL 9:102 (2)(a)). It is, however, questionable whether the fictional fulfilment of the condition also depends on the other limitations on the availability of specific performance cited in PECL 9:102 (2). Indeed, specific performance cannot be obtained if 'performance would cause the obligor unreasonable effort or expense' (PECL 9:102 (2)(b)); if 'the performance consists in the provision of services or work of a personal character or depends upon a personal relationship' (PECL 9:102 (2)(c)); or 'if the aggrieved party may reasonably obtain performance from another source' (PECL 9:102 (2)(d)). These limitations do not apply to conditions since they are thought to limit the competence of national courts to grant specific performance.[18] In contrast, the fictional fulfilment of a condition does not involve an order to fulfil the condition. Therefore, the limitation flowing from the impossibility or the unlawfulness of the fictional fulfilment of a condition should not be explained with reference to PECL 9:102 (2)(a) (specific performance), but—as the rule itself provides[19]—with reference to the more general principle that there is no enforcement of unlawful or impossible obligations.

6 **Applications of fictional fulfilment.** If, in applying the flexible legal regulation of the PICC (above, [4]), the innocent party chooses to ask for fictional fulfilment because of an interference with the condition by the other party, the effects of the fiction must be distinguished depending on the nature of the condition. if a suspensive condition is prevented from fulfilment, the contract or the obligation under the suspensive condition will be treated as having come into force.[20] Conversely, if a resolutive condition was prevented from fulfilment, the obligation or the contract under this condition will be regarded as terminated.[21] The inverse is true where fulfilment is brought about: If one party brought about the fulfilment of a suspensive condition, fictional fulfilment means that the obligation or contract suspended via the condition will not come into force.[22] In the case of a resolutive condition, the contract or the obligation that was under the condition is to be treated as remaining in force.[23]

7 **Other remedies available to the other party.** As mentioned before (above, [4]), the fictional fulfilment or non-fulfilment of the condition is not the only remedy available under European private law,[24] but the innocent party may choose the most appropriate remedy amongst fictional fulfilment, rescission, and damages.[25] There are however, some difficulties with the application of these general remedies. The first difficulty concerns the quantification of damages when it remains unclear whether the condition would have been fulfilled or not fulfilled without the other party's interference. If the fulfilment or non-fulfilment of the condition was not probable, it could be regarded as unfair to impose the entire loss on the interfering party.[26] The second difficulty relates to termination. While DCFR III-1:106 clearly provides a right of

17 PECL 16:102, Comment B.
18 PECL 9:102, Comment D.
19 PECL 9:102, Comment E.
20 See PECL 16:102, Comment B (Illustration 1); *Vogenauer*/Rowan, Art 5.3.3, [24].
21 See PECL 16:102, Comment C (Illustration 4); *Vogenauer*/Rowan, Art 5.3.3, [29].
22 See PECL 16:102, Comment B (Illustration 2); see also *Vogenauer*/Rowan, Art 5.3.3, [27].
23 See PECL 16:102, Comment C (Illustration 3); see also *Vogenauer*/Rowan, Art 5.3.3, [30].
24 *Vogenauer*/Rowan, Art 5.3.3, [26].
25 Critically *Vogenauer*/Rowan, Art 5.3.3, [33].
26 *Vogenauer*/Rowan, Art 5.3.3, [20]; see also DCFR III.-1:106, Comment H.

termination for the innocent party,[27] the PICC does not mention this remedy explicitly.[28] Both questions must be solved with regard to the aforementioned criteria of good faith and fair dealing or unreasonableness (above, [3]), and the general rules on remedies. The available remedies are therefore to be determined by the scope of the condition intended by the parties. Damages for loss can only be granted if the risk of the non-fulfilment or fulfilment was not assigned to the injured party. If the interference with the condition amounts to fundamental non-performance (PECL 9:301) there is no reason not to allow the innocent party to rescind the contract. Hence, the ability to terminate the contract and/or claim damages for any loss caused depends on the circumstances of each individual case.[29]

27 DCFR III-1:106, Comment H.
28 *Vogenauer*/Rowan, Art 5.3.3, [21].
29 Vogenauer (fn 13) 499f.

Art 16:103: Effects of Conditions

(1) **Upon fulfilment of a suspensive condition, the relevant obligation takes effect unless the parties otherwise agree.**

(2) **Upon fulfilment of a resolutive condition, the relevant obligation comes to an end unless the parties otherwise agree.**

DCFR III.-1:106: Conditional rights and obligations

(1) ...

(2) Upon fulfilment of a suspensive condition, the relevant right, obligation or relationship takes effect.

(3) Upon fulfilment of a resolutive condition, the relevant right, obligation or relationship comes to an end.

(4)–(5) ...

PICC 5.3.2: Effects of conditions

Unless the parties otherwise agree:

(a) the relevant contract or contractual obligation takes effect upon fulfilment of a suspensive condition;

(b) the relevant contract or contractual obligation comes to an end upon fulfilment of a resolutive condition.

1 **Different effects depending on the nature of the condition.** Since transnational law (PECL 16:101; PICC 5.3.1; DCFR III.-1:106 (1)) has preserved the traditional distinction between the suspensive condition (ie condition precedent, above, Intro before Art 16:101, [6]) and the resolutive condition (ie condition subsequent, above, Intro before Art 16:101, [7]), it also maintains the distinction with regard to the legal consequences of both types of conditions. When a condition is of suspensive nature, the relevant obligation takes effect upon fulfilment, whereas upon fulfilment of a resolutive condition, the relevant obligation comes to an end. The DCFR does not separate the definition of the different types of conditions from their effects; for conceptual clarity, it is, however, preferable to distinguish between the definition and the effects of the different types of condition, as is done by the PECL and the PICC (in PECL 16:101 and PECL 16:103 and PICC 5.3.1 and PICC 5.3.2) respectively.

2 **The conditional purpose.** Another difference between the textual layers concerns the scope of the rules on conditions. Whereas the PECL and the PICC solely refer to the 'obligation' that is suspended or ended via the condition, the DCFR considers 'obligation'[1] and a 'relevant right'. A 'right' in the wording of the DCFR may relate to '(a) the correlative of an obligation or liability ...; (b) a proprietary right ...; (c) a personality right ...; (d) a legally conferred power to bring about a particular result ...; (e) an entitlement to a particular remedy ...; or (f) an entitlement to do or not to do something affecting another person's legal position without exposure to adverse consequences ...'[2] This extensive definition of 'right' is due to the fact that the DCFR is meant to cover not only the law of contracts,[3] but also any other obligation.[4] This broad concept of conditional rights does not yield any solutions but perpetuates the traditional problem familiar to German law: may the exercise of a unilateral right be conditional or not (above, Intro before Art 16:101, [10])? Moreover, there is no need to apply the rules on conditions outside the field of (contractual) obligations: indeed, if the parties wish to give one party

[1] On the use of the term 'obligation' in the DCFR that implies not only contractual obligations, but also pre-contractual and obligations arising 'by operation of law' see DCFR III.-1:101, Comment D.

[2] DCFR, Definitions: Right.

[3] DCFR (Full Edition), Introduction, [30].

[4] DCFR I.-1:101 (2), see also DCFR (Full Edition), Introduction, [29], excluding 'status or legal capacity for natural persons, wills and successions, family relationship, negotiable instruments, employment relationship, immovable property law, company law and the law of civil procedure and enforcement of claims'.

a conditional right of option or a conditional warrant, they might choose to do so; in these cases, the rules for conditions may be applied by way of analogy (PECL 1:107, above, Art 16:101, [8]). In contrast to the overly broad generalisation of the DCFR, the analogous application provided for by the PECL will allow the control of the use of conditions from case to case.

Nature of fulfilment of a condition. The fulfilment of the condition is itself not an obligation. This implies that in principle, no liability is incurred for the non-occurrence of the condition, as long as it is not due to interference by one party.[5] Parties are, however, free to agree upon an obligation to fulfil the condition, and that this particular obligation might imply a stricter standard for the obliged party compared to the general duty to act in accordance with good faith and fair dealing.[6] A typical example would be a promise to use all reasonable efforts or best endeavours to fulfil the condition (above, Intro before Art 16:101, [5]).[7] Another example concerns a 'sales contract under f.o.b. subject to the grant of an export licence', where the parties have agreed that the seller had to apply for the licence. In this case, the seller might be obliged (and not only incentivized via a condition) to apply for the licence, and will be held liable if the licence is not granted.[8] 3

Time of fulfilment. The European texts do not explicitly provide for a time period for the fulfilment of the condition. The formulation of such a period is normally in the hands of the parties, but may also result from the interpretation of the condition by the court.[9] If an explicit or implied term has passed, the condition can no longer be fulfilled.[10] Fulfilment means the end of the suspension period; the same effect is obtained if the condition fails, eg if the expected event does not occur or becomes impossible.[11] 4

Effects of a suspensive condition. A suspensive condition implies that the conditional obligation takes effect after the condition is fulfilled. This prospective effect shows that the suspensive condition mainly serves to bind the parties although some (minor) questions have not yet been cleared or preparative acts have to been conducted. However, parties are free to agree upon a retrospective effect of a suspensive condition. This convention amounts to a ratification of any act of performance that has been completed before the accomplishment of the condition.[12] 5

Regular prospective effect of the resolutive condition. All European restatements have opted for the 'modern' solution of prospective effect (above, Intro before Art 16:101, [14]), meaning the exclusion in principle of a retroactive effect of the condition's fulfilment.[13] This solution is said to be 'the simplest' and most 'straightforward', without 'exceptions'.[14] In the case of a suspensive condition, this means in principle that the contract or the obligation becomes effective at the moment the event occurs; in contrast, in the case of a resolutive condition, the contract or the obligation comes to an end when the event occurs.[15] Parties are, however, free to provide 6

5 *Vogenauer*/Rowan, Art 5.3.2, [10].

6 PECL 16:102, Comment D.

7 *Vogenauer*/Rowan, Art 5.3.3, [9].

8 On the distinction whether the obligation is to achieve a specified result or to use reasonable efforts to obtain a specified result see PECL 16:102, Commentary D.

9 Fontaine and de Ly, *Drafting International Contracts*, 497 f.

10 *Vogenauer*/Rowan, Art 5.3.1, [22].

11 See also *Vogenauer*/Rowan, Art 5.3.2, [10].

12 UNIDROIT (2007) Study L—Doc 103 (available online) I.C.2.c.

13 Fauvarque-Cosson, 'New Provisions', 543 f; S Vogenauer, 'The UNIDROIT Principles of International Commercial Contracts at twenty: experiences to date, the 2010 edition, and future prospects', (2014) 19 *Uniform LR* 481–518, 498; *Vogenauer*/Rowan, Art 5.3.2, [2].

14 See DCFR III.-1:106, Comment G; for the PICC see *Vogenauer*/Rowan, Art 5.3.2, [4].

15 For examples see PECL 16:103, Comment A.

for retroactivity and—as always—this intention can also be derived from the circumstances of the case. The retroactive approach still present in some European legal systems aims to protect the beneficiary of the condition during the time of suspension; indeed, retroactivity can invalidate prejudicial conduct of the other party, since it is deemed not to have occurred.[16] Some international texts try to grant equivalent protection via a rule on the preservation of rights (PICC 5.3.4; see below, Art 16:104). This combination of non-retroactivity and a protection rule for the beneficiary seems to be a just compromise between the simplest solution (non-retroactivity) and the need to protect the beneficiary against prejudicial acts in the interim.

[16] On the function see *Vogenauer*/Rowan, Art 5.3.2, [3].

Art 16:104: Duty to Preserve Rights

PICC 5.3.4: Duty to preserve rights

Pending fulfilment of a condition, a party may not, contrary to the duty to act in accordance with good faith and fair dealing, act so as to prejudice the other party's rights in case of fulfilment of the condition.

Introduction. Dealing with the period for which the condition is suspended also involves providing for rules about the rights that are pending. In contrast to PECL 16:102, DCFR III.-1:106, and PICC 5.3.3, the rule in PICC 5.3.4 is not concerned with interference with the condition itself, but refers to any other conduct prior to the fulfilment of the condition.[1] PICC 5.3.4 is the only restatement that deals with the effects of the pending condition on the respective rights of the parties. The reason given for this special duty is that the situation of pending conditions is inadequately covered by the rules on interference or breach of condition, since the duty does not touch the condition itself, but the conditional rights as such.[2] Moreover, it was argued that the provision would help the parties to include rules to that effect in their draft of the contract, which would in turn help to prevent disputes.[3] There is no reason why these arguments would not apply to European private law, which is why it is advisable that the provision be added to the terms of the PECL 16:101–PECL 16:103. 1

Situations covered. The duty to preserve rights applies equally to suspensive and to resolutive conditions. It requires that a party not take actions that, contrary to good faith and fair dealing, aggrieve the rights of the other party that will come into force once the condition takes effect.[4] In case of a suspensive condition, the parties are bound not to inflict a detriment to the future contractual rights that will be effective after the fulfilment of the suspensive condition. The suspended contract therefore already has a pre-effect, and the parties are obliged to act in accordance with good faith and fair dealing.[5] Similarly, in the case of a resolutive condition, the parties have to consider the possibility of the future termination of their contract; this is why, although the rights have already transferred via contract, each party may not undermine the rights that the other party would have if the contract came to an end due to the fulfilment of the resolutive condition. 2

No real effect. The duty to preserve rights is inspired by national law, especially the German BGB. Indeed, the German legislation not only provides for the fictional fulfilment of the condition (§ 162 BGB), it also establishes liability in the period of suspense (§ 160 BGB),[6] and provides for the ineffectiveness of dispositions in the period of suspense (§ 161 BGB).[7] This last 3

[1] *Vogenauer*/Rowan, Art 5.3.4, [7].

[2] Fauvarque-Cosson, 'New Provisions', 547 f.

[3] Fauvarque-Cosson, 'New Provisions', 548.

[4] *Vogenauer*/Rowan, Art 5.3.4, [1].

[5] Similarly *Vogenauer*/Rowan, Art 5.3.4, [2].

[6] § 160 (1) BGB: 'Any person who has a right subject to a condition precedent may, in the case of the satisfaction of the condition, demand damages from the other party if the latter, during the period of suspense, is at fault for defeating or adversely affecting the right dependent on the condition.
(2) In the case of a legal transaction entered into subject to a condition subsequent, the person to whose advantage the former legal situation is restored has the same claim on the same conditions.' (available online).

[7] § 161 (1) BGB: 'If a person has disposed of a thing, and the disposition is subject to a condition precedent, any further disposition which he makes as regards the thing in the period of suspense is ineffective on the satisfaction of

provision in German law is deemed to have 'real effect', meaning that it will also apply against third parties who acquire a right that is in suspense between the parties of the contract, unless the third parties are protected by the special provisions on acquisition from unauthorized persons (good faith purchase).[8] In contrast to these unique rules of German law, the European restatements of contract law do not cover the proprietary aspects of the law of conditions. Therefore, the duty to preserve rights does not interfere with the rules on acquisition of ownership. The only remedy that is available to the other party will be compensation, ie damages (below, [4]).

4 **Right to damages.** A right to damages is not explicitly envisaged in PICC, PECL, or DCFR. It stems from the fact that—as shown in other provisions of European private law[9]— a contravention of a duty of good faith and fair dealing leads to liability.[10] This is in agreement with some national laws,[11] which grant damages in the case of contravention of a conditional obligation.

the condition to the extent that it would defeat or adversely affect the effect subject to the condition. Such a disposition is equivalent to a disposition which is effected during the period of suspense by execution or attachment or by the administrator in insolvency proceedings.

(2) In the case of a condition subsequent, the same applies to the dispositions of a person whose right expires on the fulfilment of the condition.

(3) The provisions in favour of those who derive rights from an unauthorised person apply with the necessary modifications.' (available online).

[8] On the effects of § 160 BGB in contrast to § 161 BGB see S Meier, 'Schadenersatz aus Verfügungsgeschäften: Zum Hintergrund des § 160 BGB', (2012) 76 *RabelsZ* 732–60, 755 f; on the protection of third parties see *Münchener Kommentar*/Westermann, § 161, [19]–[21].

[9] The most visible example is liability for negotiations in bad faith, see PECL 2:301; DCFR II.-3:301; PICC 2.1.15.

[10] This result is disputed for the PICC because of the influence of US Law, see *Vogenauer*/Vogenauer, PICC 1.7, [38]–[40].

[11] § 160 BGB and Art 152 OR; on the restriction to the conditional obligation see Meier (fn 8) 758 f.

Art 16:105: Restitution in Case of Fulfilment of a Resolutive Condition

PICC 5.3.5: Restitution in case of fulfilment of a resolutive condition

(1) On fulfilment of a resolutive condition, the rules on restitution set out in Articles 7.3.6 and 7.3.7 apply with appropriate adaptations.
(2) If the parties have agreed that the resolutive condition is to operate retroactively, the rules on restitution set out in Article 3.2.15 apply with appropriate adaptations.

DCFR III.-1:106: Conditional rights and obligations

(1)–(4) ...

(5) When a contractual obligation or relationship comes to an end on the fulfilment of a resolutive condition any restitutionary effects are regulated by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) with appropriate adaptations.

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(1)–(2) ...

(3) When a contractual obligation comes to an end on the fulfilment of a resolutive condition any restitutionary effects are regulated by the rules in Chapter 16 on restitution with appropriate adaptations.

Synthesis (based on PICC 5.3.5): Restitution in Case of Fulfilment of a Resolutive Condition

(1) On fulfilment of a resolutive condition, the rules on restitution set out in *Article 9:306* apply with appropriate adaptations.
(2) If the parties have agreed that the resolutive condition is to operate retroactively, the rules on restitution set out in Article *4:115-1* apply with appropriate adaptations.

Scope of the provision. PICC 5.3.5 and DCFR III.-1:106 contain a provision which has no equivalent in the PECL. Its scope is limited to the fulfilment of a resolutive condition and is aimed at allowing restitution after the contract has been terminated by the fulfilment of the condition, if the parties have already partly or entirely performed their obligations.[1] The drafters of the PICC and of the DCFR decided to provide explicit rules for restitution in the case of the fulfilment of a resolutive condition. These rules are expressions of the general principle of good faith that may be unfamiliar to courts and arbitrators of common law.[2] The explicit rules are meant to help those who apply the law. 1

Heterogeneous answers. There is no uniform answer to the question of restitution after fulfilment of a condition in transnational law. The CISG does not refer to the question as it excludes questions of validity from its sphere;[3] the PECL do not provide an answer either, but the Official Comment states that, after the fulfilment of a condition, the money or property that has been delivered will have to be restored according to the rules of unjust enrichment.[4] The most complete regulation can be found in the PICC, which distinguish restitution after the fulfilment of 2

[1] Fauvarque-Cosson, 'New Provisions', 543 with regard to PICC 5.3.5.
[2] cf UNIDROIT (2008) Study L—Doc 108, 7; UNIDROIT (2009) Study L—Doc 113 (available online) 12; see also S Vogenauer, 'The UNIDROIT Principles of International Commercial Contracts at twenty: experiences to date, the 2010 edition, and future prospects', (2014) 19 *Uniform LR* 481–518, 499.
[3] R Zimmermann, 'The Unwinding of Failed Contracts in the UNIDROIT Principles 2010', (2011) *Uniform LR* 563–87, 567.
[4] PECL 16:103, Comment B.

a resolutive condition with prospective effect from a resolutive condition with retroactive effect. In detail, the coming into force of a 'normal' resolutive condition will lead to the restitution rules that also apply to prospective termination (PICC 7.3.6 and PICC 7.3.7), whereas restitution after the fulfilment of a resolutive condition with retroactive effect will be treated according to the rules of avoidance (PICC 3.2.15). The idea that lies behind this distinction is that avoidance, in contrast to termination, is itself retroactive (PICC 7.3.6). In fact, avoidance under PICC 3.2.14 is characterized by the idea that the contract is considered never to have existed. Therefore, all exchange of performance has been without any legal foundation.[5] In contrast to this, termination has a prospective effect on the validity of the contract, meaning that all performance has been received on a legal basis, but that, since the termination, the legal basis has fallen away.[6] Another distinction has been opted for in DCFR III.-1:106 (5),[7] which refers to different kinds of conditions. A resolutive condition will, irrespective of its prospective or retroactive effect, lead to the restitutionary rules that would apply if the contract had been terminated. However, restitution after the non-fulfilment of a suspensive condition will be treated as a case of 'unjustified enrichment', as if the contract had been void *ab initio*.[8]

3 **The distinction between prospective and retroactive effect.** The differences observed with regard to the restitutionary rules after the fulfilment of a condition within the different layers of European and international private law can be explained by the general variation and tentativeness of restitutionary regimes of national legal systems. Indeed, the distinction between prospective and retroactive effect within the PICC (above, [2]) can be regarded as a consequence of the maintenance of a general distinction between avoidance (retroactive effect) and termination (prospective effect). It has been stressed that the actual differences between the two regimes are small[9] and that the insistence on different types of restitutionary claims is more due to tradition than legal necessity.[10] However, the drafters of the PICC[2010] have stuck to the traditional separation of the two regimes, mainly because of the conceptual difference between termination and avoidance.[11] This conceptual difference is particularly relevant if the contract is not of such a nature that it can be performed 'at one time' (PICC 7.3.6), but must be performed 'over a period of time' (PICC 7.3.7). If the condition has prospective effect, a contract that must be performed over a period of time will be separated into two parts, one before the fulfilment of the condition and one after the fulfilment.[12] If the condition has retroactive effect, however, the rules on avoidance will oblige the parties to restore every performance that they have received, irrespective of the nature of the contract. The distinction emphasized in the PICC therefore seems superior to the very general solution favoured by the PECL and the DCFR respectively.

4 **Restitution in the case of a suspensive condition.** While PICC 5.3.5 is limited to restitution after the fulfilment of a resolutive condition, DCFR III.-1:106 and the Commentary on the PECL 16:103 also explicitly deal with the 'recovery of money and property' in the case of a suspensive condition.[13] Indeed, it may occur that one of the parties or even both parties already performed or partly performed the conditional contract or the conditional obligations. In these

5 Zimmermann (fn 3) 569.
6 Zimmermann (fn 3) 569.
7 DCFR III.-1:106, Comment I, referring to DCFR III.-3:510–3:514.
8 DCFR III.-1:106, Comment I.
9 See *Vogenauer*/Huber, PICC 7.3.6, [1]; Zimmermann (fn 3) 570.
10 Zimmermann (fn 3) 569.
11 *Vogenauer*/Du Plessis, PICC 3.2.15, [3].
12 PICC 7.3.7, provided the contract is divisible, on which see PICC 7.3.7, Comment 1.
13 PECL 16:103, Comment B.

cases, it seems to be appropriate to allow restitution of those benefits which—against the expectations of the parties—may not be kept by the party who received them.[14] The PECL do not provide for general rules on restitution, but take the claim for granted if the contract is avoided (PECL 4:115) or illegal in the sense of PECL 15:101 or PECL 15:102 (PECL 15:104). The generally accepted rules on restitution are said to be that money is to be repaid and that services and other non-monetary performances are to be compensated by paying their reasonable value.[15] No consensus has yet been reached on the question of whether property automatically re-vests and who bears the risk of accidental destruction or deterioration of the property before effective restitution.[16] Due to the differences between legal systems with regard to the transfer of property, on a European and international level it seems to be preferable to grant a personal right to obtain transfer of ownership, and not to re-vest the property in the transferor.[17]

Long-term contracts. As already mentioned, with regard to restitution, the PICC distinguish between contracts to be performed at one time and long-term contracts.[18] While the termination of contracts to be performed at one time does not in principle differ from restitution after avoidance, the prospective effect of termination may lead to a division of a long-term contract into at least two parts. The part that has been performed before termination will continue to be valid and no restitutionary claim will be available; for the part that is to come, however, no claim for performance will be possible. A total restitution of the former parts of a long-term contract is only possible if the contract cannot be divided (PICC 7.3.7). The parties will then have to restore all money or property that they have received during the life span of the contract.

[14] This is also the position of American law see Gabriel, 'An American Perspective', 166.
[15] See PECL 4:115, Note 1.
[16] See PECL 4:115, Note 3.
[17] On the PICC see *Vogenauer*/Du Plessis, PICC 3.2.15, [2].
[18] On the drafting of these differences see Zimmermann (fn 3) 568.